

‘Common-Good Constitutionalism’ and the New Battle over Constitutional Interpretation in the United States

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Abstract

Drawing on the natural law tradition and arguments developed in his extensive work on administrative and constitutional law, in a series of recent essays the prominent public law scholar Adrian Vermeule has argued the time has come for legal conservatives in the United States to set originalism aside. Instead, Vermeule argues that conservatives should approach constitutional interpretation in an openly morally infused way and open to using state power to promote the common good - an approach to constitutionalism Vermeule dubs ‘*common-good constitutionalism*’. Vermeule’s proposal immediately sparked extensive and heated responses across both conservative and liberal legal circles.

This essay is the first to offer a sustained scholarly analysis of this burgeoning debate. I have two main objectives: one explanatory, one critical. The first objective is to offer a clearer account and appreciation of what proponents of common-good constitutionalism are advocating. This is necessary as I suggest that, unfortunately, many preliminary critiques of the concept have been awash with analytical imprecision and overstatement. I therefore wish to clarify the core terms and concepts pertinent to Vermeule’s brief essay, by digging deeper into the political context from which the call to adopt common good constitutionalism emerged, before outlining its core operative principles and their broader intellectual underpinning.

My second aim is to critically analyse Vermeule’s arguments by addressing the initial wave of criticism hostile to the proposal. Contrary to these critiques, I suggest Vermeule’s proposal is entirely consistent with the natural law legal tradition and emphatically not an argument for authoritarianism unbound from legal and democratic constraint or concern for human rights. I conclude critiques starting from the premise common good constitutionalism is effectively a form of anti-constitutional authoritarianism are not only inaccurate, but deeply unhelpful to fruitful engagement over the core questions Vermeule’s arguments raise for public lawyers.

Keywords

Constitutional law; Natural law; Common good; Separation of powers; Political morality.

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Introduction

Fascination with United States culture tends to manifest in similar ways in many countries: conspicuous consumption of Hollywood and Silicon Valley's latest outputs, keen interest in the op-eds of its leading media outlets, and avid following of the pageantry and personalities of apex federal politics. This fascination also finds expression in the close interest paid by foreign lawyers to the ebb and flow of long-running battles over the United States' 233-year-old Constitution and its interpretation, an interest which often metastasizes into influence. Constitutional debates sparked in the United States – including over the so-called 'counter-majoritarian difficulty'², originalism's³ status as a method of interpretation, whether to regard 'constitutional moments' as de facto constitutional amendments,⁴ or the respective merits of 'judicial supremacy'⁵ 'departmentalism'⁶ and 'popular constitutionalism'⁷ as the best means of allocating responsibility in respect of constitutional interpretation – frequently tend to spread and capture the imaginations and scholarly agendas of public lawyers the world over.

This fascination with America ensures renewed debate amongst legal and political commentators over that perennial question—the best method to interpret the Constitution—will be intently followed by public lawyers beyond its borders. The most recent incarnation of this debate concerns whether originalism ought to be abandoned as the favoured constitutional theory of legal conservatives. Drawing on the classic legal and natural law tradition, and arguments developed in his extensive work on administrative and constitutional law, the prominent public law scholar Adrian Vermeule has argued in a series of recent essays that the time has come for legal conservatives to set originalism aside. In its stead, Vermeule argues that conservatives should approach constitutional interpretation in an openly morally infused way and should be sanguine about using state power to promote the common good⁸—an approach to constitutionalism Vermeule dubs '*common-good constitutionalism*'.

² Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Yale University Press, 1962) John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1980).

³ Antonin Scalia, "Originalism: The Lesser Evil" (1987) 59 University of Cincinnati Law Review 849.

⁴ Bruce Ackerman, *We the People, Volume One: Foundations* (Harvard University Press, 1991).

⁵ Larry D. Kramer, "The Supreme Court, 2000 Term—Foreword: We the Court" (2001) 115 Harvard Law Review 169.

⁶ Richard H. Fallon, "Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age" (2018) 96 487.

⁷ Robert Post & Reva Siegel, "Popular Constitutionalism, Departmentalism, and Judicial Supremacy" (2004) 92 California Law Review 1027.

⁸ The primary discussion of Common-good constitutionalism, and the focus of this article is Adrian Vermeule, "Common Good Constitutionalism" (2 April 2020), *The Atlantic*, available at <https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/> [Accessed 3 April 2020]. But Vermeule discusses the concept further in several subsequent articles from which I also draw: Adrian Vermeule, "Deference and the Common Good" (8th May 2020), *Mirror of Justice*, available at <https://mirrorofjustice.blogspot.com/mirrorofjustice/2020/05/a-confusion-about-deference.html> [Accessed 9 May 2020]; Adrian

Vermeule's proposal immediately sparked extensive and heated responses across both conservative and liberal legal circles. Some interlocutors have variously charged him with subverting the country's important founding principles⁹ and advocating for authoritarianism.¹⁰ Others welcomed it as a much needed reminder that legal interpretation cannot be severed from questions of political morality and a conception of the ultimate *purpose* of constitutional government.¹¹ This essay is the first to offer a sustained scholarly analysis of this burgeoning debate and emerging school of constitutional thought.¹² The debate is important for several reasons. First, the political backdrop to common good constitutionalism lies in a growing disenchantment amongst many conservatives with the conservative political and legal establishment's commitment to economic liberalism and a small role for the state in regulating socio-economic life. Common good constitutionalism, in many respects, represents the

Vermeule, "On Common Good Originalism" (9th May, 2020), *Mirror of Justice*, available at <https://mirrorofjustice.blogs.com/mirrorofjustice/2020/05/common-good-originalism.html> [Accessed 9 May 2020]; Adrian Vermeule, "Common Good Constitutionalism: A Model Opinion" (17 June 2020), *Ius & Iustitium*, available at <https://iusetiustitium.com/common-good-constitutionalism-a-model-opinion/> [Accessed 25 June 2020]. For the sake of precision, it should also be noted that while Vermeule's piece in the *Atlantic* is titled 'Beyond Originalism', Vermeule subsequently clarified that 'real title of the piece is "Common-Good Constitutionalism" and that 'Beyond Originalism' was the title chosen by the periodical. See Adrian Vermeule, "Common Good Constitutionalism Interview" (20 April, 2020), *Mirror of Justice*, available at <https://mirrorofjustice.blogs.com/mirrorofjustice/2020/04/common-good-constitutionalism-interview-english-translation.html> [Accessed 22 April 2020]. Accordingly, I refer to it here under Vermeule's preferred title.

⁹ Randy Barnett, "Common-Good Constitutionalism Reveals the Dangers of Any Non-originalist Approach to the Constitution" (3 April, 2020), *The Atlantic*, available at <https://www.theatlantic.com/ideas/archive/2020/04/dangers-any-non-originalist-approach-constitution/609382/> [Accessed 5 April 2020]; Richard Epstein, "The Problem with Common good Constitutionalism" (6 April 2020), *The Hoover Institute*, available at <https://www.hoover.org/research/problem-common-good-constitutionalism> [Accessed 9 April 2020]; Jack Balkin, "Common Good Versus Public Good" (3 April 2020), *Balkinization*, available at <https://balkin.blogspot.com/2020/04/common-good-versus-public-good.html> [Accessed 6 April 2020].

¹⁰ Garrett Epps, "Common-Good Constitutionalism Is an Idea as Dangerous as They Come" (3 April, 2020) *The Atlantic*, available at <https://www.theatlantic.com/ideas/archive/2020/04/common-good-constitutionalism-dangerous-idea/609385/> [Accessed 5 April 2020]; David Dyzenhaus, "Schmitt in the USA" (4 April, 2020), *Verfassungblog: On Matters Constitutional*, available at <https://verfassungsblog.de/schmitt-in-the-usa/> [Accessed 6 April 2020]; Blake Emerson, "Progressive Democracy and Legislative Form" (14 April, 2020), *Law & Political Economy Project*, available at <https://lpeproject.org/blog/progressive-democracy-and-legislative-form/> [Accessed 20 April 2020].

¹¹ Hadley Arkes, "Vermeule, his Critics, and the Crisis of Originalism" (5 June 2020) *The American Mind*, available at <https://americanmind.org/features/waiting-for-charlemagne/vermeule-his-critics-and-the-crisis-of-originalism/> [Accessed 7 June 2020]; *In re Abbott* 954 F.3d 772 (5th Cir. 2020) (2021) 134 Harvard Law Review 1228; Sotirios Barber, Stephen Macedo and James Fleming, "The Constitution, the Common Good, and the Ambition of Adrian Vermeule" (26 January, 2021) *The Constitutionalist*, available at <https://theconstitutionalist.org/2021/01/26/the-constitution-the-common-good-and-the-ambition-of-adrian-vermeule-by-sotirios-barber-stephen-macedo-and-james-fleming/> [Accessed 31 March, 2021]; Stéphane Serafin, Kerry Sun, and Xavier Focroulle Ménard, 'The Common Good and Legal Interpretation: A Response to Leonid Sirota and Mark Mancini' (2021) 30(1) *Constitutional Forum* 40.

¹² Vermeule is one of the leading scholarly voices in what can be regarded as a jurisprudential turn amongst US based scholars to revive the Thomistic natural law tradition and prise American conservative legal thought away from classic liberalism and libertarianism. For more work by commentators and scholars promoting this school of thought the recently-established law and jurisprudence blog *Ius & Iustitium*, with which Vermeule is associated, offers a good resource. Available at <https://iusetiustitium.com/about-us/> [Accessed 10 May 2020]. Resurgence in scholarly interest in the relationship between law and the common good can also be seen with Oxford University Law Faculty's new research project entitled '*the Common Good Project*'. Based in Blackfriars College, the project's aim is to foster a 'discussion of the relationship between law and the common good' through scholarly conversation and engagement: <https://www.law.ox.ac.uk/research/common-good-project> [Accessed 31 March]. In the interests of disclosure, the current author is a member of the project's advisory board.

underpinning constitutional theory for this growing postliberal political approach and its call for conservatives to become more open to using state power actively to promote the common good. Should the influence of the conservative postliberal movement grow, then common good constitutionalism could in time have serious political and judicial impact, profoundly shaping how constitutional officials approach issues like the separation of powers and the nature and scope of constitutional rights, making it a concept in pressing need of preliminary analysis and evaluation.

Moreover, common good constitutionalism is presented by Vermeule as an alternative not only to originalism, but to liberal constitutionalism and its overriding emphasis on safeguarding individual rights and limiting state power more generally. Given the influence that legal debates in the United States often have abroad, common good constitutionalism could end up being imported by foreign constitutional actors who might regard it as a more normatively appealing expression of constitutionalism than liberal constitutionalism, particularly if they have illiberal political commitments. Whether one finds this a regrettable prospect or not, the potential influence and impact of common good constitutionalism mean that it deserves careful and robust consideration at an early stage.

Finally, although the debate on common good constitutionalism has thus far not been fully articulated in a conventional academic forum but has instead taken place in informal fora such as legal blogs and non-academic journals, I suggest that this does not make the debate any less worthy of sustained analysis. Many of Vermeule's interlocutors – including Balkin, Barnett, Dyzenhaus, Epps, Epstein, and McGinnis – are, like Vermeule himself, influential public law scholars who have made significant contributions to constitutional law and theory and influenced academic, political, and judicial debates on the topic. Their preliminary arguments and critiques of this important debate, even if embryonic and not yet expressed in formal scholarly fora, still merit serious assessment.

I have two main objectives: one explanatory, one critical. The first is to offer a clearer account and appreciation of what proponents of common-good constitutionalism are advocating. This is necessary as I suggest that, unfortunately, many preliminary assessments of the concept have been awash with analytical imprecision and overstatement. I therefore wish to clarify the core terms and concepts raised in Vermeule's brief essay: by digging deeper into the political context from which the call to adopt common good constitutionalism emerged, before outlining

its core operative principles and their broader intellectual underpinning in both the natural law tradition and in Vermeule's extensive prior works on public law. This, I hope, will give foreign scholars a better ability to assess and engage with this nascent and important debate.

My second aim is to critically analyse Vermeule's arguments by addressing the initial wave of criticism hostile to his proposal for common good constitutionalism. Contrary to these critiques, I suggest Vermeule's proposal is entirely consistent with the natural law tradition and is emphatically not an argument for authoritarianism or fascism in the sense of a state, or more precisely an executive, unbound from legal or democratic constraint or concern for human rights. I conclude that critiques starting from the premise that common good constitutionalism is effectively a form of anti-constitutional authoritarianism are not only inaccurate, but deeply unhelpful to fruitful engagement over the core questions Vermeule's arguments raise for public lawyers.

The first part of this article sketches, in broad strokes, the background political debate from which the proposal for conservatives to adopt common good constitutionalism emerged. The second part outlines the core principles of common-good constitutionalism and, where appropriate, fleshes out its broader intellectual underpinnings in the natural law tradition and in Vermeule's extensive work on public law theory. The third part offers a critical analysis of the theory's initial reception. The final part offers a conclusion and brief reflection on the potential future of common good constitutionalism.

Political backdrop to Common-good Constitutionalism

American conservative political thought is in flux. From the 1960s until recently, the mainstream politics of self-identified American conservatism had comfortably stabilised into a 'fusion' of two broad policy planks: cultural/social traditionalism combined with a broadly libertarian/neoliberal economic outlook.¹³ Core principles of this settlement include limiting government regulation of economic life; pursuing the privatisation or reduction of government services; promoting international free trade and economic globalisation; deregulation of the financial industry; and a belief that state power in the domestic sphere is the greatest threat to public welfare and must be strictly monitored.¹⁴ On the social front, it involved pursuing issues

¹³ See Jedediah Purdy, David Singh Grewal, Amy Kapczynski and K. Sabel Rahman, "Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis" (2020) 129 *Yale Law Journal* 1784, 1789.

¹⁴ Gladden Pappin, "From Conservatism to Postliberalism: The Right After 2020" (2020) IV *American Affairs* 174-190.

like safeguarding religious liberty, attacking the regulatory state bequeathed by the New Deal era, exhorting the importance of institutions like (even if it did not encompass active economic assistance for) marriage and stable families,¹⁵ and appointing judges open to overturning or limiting *Roe v Wade*.¹⁶

The stability of this fusionist political coalition was rocked in 2016 with the shock election of Donald J. Trump. Trump's dramatic rise to the presidency raised a question mark over the longevity of the fusionist coalition.¹⁷ A pressure point of the fusionist project that Trump's insurgent election campaign seemed to pinch, was the fact that many had grown to believe that an economically libertarian/neoliberal approach to issues like market regulation, economic inequality, globalization, and deindustrialisation, all seemed to frustrate pursuit of the second plank of the fusionist plank - the promotion of flourishing families and local communities, strong religious communities, and ways of life conducive to human dignity.¹⁸

For some, Trump's incompetence notwithstanding, the fact that there appears to be a sizeable percentage of Americans who favour increased state intervention in economic life *and* an end to destabilising forms of cultural and economic liberalism, presents a good opportunity to drive a wedge between the long-standing fusion of economic libertarianism and social conservatism, and to forge a new political direction for conservatism beyond Trump's exit from political life.¹⁹

One of the most prominent group of critical conservatives in this vein - many of whom are not institutionally affiliated with the Republican party - regards the Trump presidency as an opening salvo in a battle for a new era of conservative politics, and the possibility of a fundamental realignment of its political goals and attitude to state power. This group – broadly referred to as postliberal – has been the most vocal in articulating intellectual alternatives to the fusionist status quo. This bloc is associated with commentators and scholars like Sohrab

¹⁵ Gladden Pappin and Maria Molla, "Affirming the American Family" (2019) III *American Affairs*.

¹⁶ (1973) 410 U.S. 113. Where the Supreme Court found the Constitution's unenumerated right to privacy encompassed a liberty to have a physician induce termination of a pregnancy.

¹⁷ Ross Douthat, "What Are Conservatives Actually Debating?" *New York Times* (4 June 2019).

¹⁸ Douthat, "What Are Conservatives Actually Debating?"

¹⁹ 'Pappin, "From Conservatism to Postliberalism".

Ahmari,²⁰ Susannah Black,²¹ Oren Cass,²² Patrick Deenen,²³ Andrew Willard Jones,²⁴ Julius Krein,²⁵ Gladden Pappin,²⁶ C.C. Pecknold,²⁷ and Adrian Vermeule,²⁸ and Edmund Waldstein.²⁹

Postliberal commentators draw on a diverse range of thought critical of economic, social, and political liberalism. Their critiques draw variously from the Aristotelian and Thomist tradition; Catholic social teaching; communitarian, cultural, and sociological critiques of contemporary strands of liberalism, and from classic anti-liberal thinkers like Joseph DeMaistre,³⁰ Donoso Cortes,³¹ and Carl Schmitt.³² While not a monolithic intellectual bloc, when taken together, they are a group increasingly united in a shared view that conservative politics must abandon its commitment to economic libertarianism, and become more open to using state power to promote an affirmative vision of the common good and secure the socio-economic conditions respectful of it.

A core unifying feature of postliberal conservatives is a clear rejection of the notion that the purpose of the state is to act as the preserver of individual liberties, while remaining largely agnostic to promoting thick conceptions of the good life. Postliberals therefore emphatically reject political, social, and economic liberalism – understood as a family of doctrines which share a ‘master commitment’ to the autonomy of the ‘individual, of the individual’s reason and desires’.³³ This commitment, in turn, is said to guide liberalism’s core political aim of an ‘ever-greater liberation of human capacities from the constraints—political, social, economic, even

²⁰ Benjamin Wallace-Wells, “David French, Sohrab Ahmari, and the Battle for the Future of Conservatism” (12 September 2019), *The New Yorker*, available at <https://www.newyorker.com/news/the-political-scene/david-french-sohrab-ahmari-and-the-battle-for-the-future-of-conservatism> [Accessed 20 August 2020].

²¹ Black, “Common Good Constitutionalism Considered”.

²² Nick Burns, “The New Intellectuals of the American Right” (7 April 2020), *The New Statesman USA*, available at <https://www.newstatesman.com/world/north-america/2020/04/new-intellectuals-american-right> [Accessed 20 April 2020].

²³ Patrick Deenen, *Why Liberalism Failed* (Yale University Press, 2017).

²⁴ Andrew Willard Jones, “The Postliberal Moment” (31 December 2018), *New Polity*, available at <https://newpolity.com/blog/2018/10/10/what-is-liberalism> [Accessed 10 April 2020].

²⁵ Julius Krein, “The Real Class War” (2019) III *American Affairs*.

²⁶ Pappin, “From Conservatism to Postliberalism”.

²⁷ CC. Pecknold, “False Notions of the Common Good” (23 April 2020), *First Things*, available at <https://www.firstthings.com/web-exclusives/2020/04/false-notions-of-the-common-good> [Accessed 20 April 2020].

²⁸ Adrian Vermeule, “A Christian Strategy” (November 2017), *First Things*, available at <https://www.firstthings.com/article/2017/11/a-christian-strategy> [Accessed 10 June 2020].

²⁹ Edmund Waldstein, ‘Hard Liberalism, Soft Liberalism, and the American Founding’ (11 April, 2018) *The Josias*, available at <https://thejosias.com/2018/04/11/hard-liberalism-soft-liberalism-and-the-american-founding/> [Accessed 6 April 2021].

³⁰ See Joseph De Maistre’s, *Considerations on France* trans. Richard A. Lebrun (Cambridge University Press, 1994).

³¹ See Juan Donoso Cortes, *Readings in Political Theory* (ed.) R.A. Herrera (Sapientia Press, 2007).

³² See Carl Schmitt, *Political Theology: Four Chapters on the Concept of the Political* (Translation by George Schwab, University of Chicago Press, 2005); Carl Schmitt, *The Crisis of Parliamentarism* (Translation by Ellen Kennedy, 2nd edn MIT Press, 1988).

³³ Adrian Vermeule, “All Human Conflict is Ultimately Theological” (26 July 2019), *Notre Dame Church Life Journal*, available at <https://churchlifejournal.nd.edu/articles/all-human-conflict-is-ultimately-theological/> [Accessed 15 April 2020].

biological—that hamper the maximum fulfilment of that autonomy, consistent with a like fulfilment for all.’³⁴

Whatever stripe of liberalism is being considered, postliberals broadly argue that, when stripped down, its master commitments are a common dedication to individual autonomy and freedom from constraint inconsistent with a politics that can safeguard human flourishing. Postliberal commentators therefore tend to regard mainstream factions of both the Democratic and Republican parties as fundamentally liberal in their philosophical outlook;³⁵ that is, both parties, at root, embrace a substantive set of moral master-commitments centred on individual autonomy - albeit each views the role of the state and market in securing this same end very differently.³⁶

For postliberals, conservative fusionism’s deep devotion to ‘unregulated markets and libertarianism’ has dealt a serious blow to the health of the polity. They view its overriding commitment to neoliberal economics, and refusal to use state power to promote the common good, as having made a sizeable contribution to a wide range of contemporary problems afflicting the US, including immense inequality, climate change/environmental degradation, and a tragic epidemic of drug abuse and a rise in death by suicide.³⁷

Postliberals argue that these kinds of ills have no chance of being seriously challenged unless conservative actors are willing to populate the leading institutions of state and use their power to direct socio-economic life toward the ‘*common good*’ and human flourishing. References to the common good clearly invoke the natural law tradition of Aristotle and Aquinas, where that concept is broadly understood as ‘a state of affairs in which each individual within a political community and the political community as a whole is flourishing.’³⁸ This includes,

³⁴ Vermeule, “All Human Conflict is Ultimately Theological”.

³⁵ R.R. Reno, “What Liberalism Lacks” (31st May, 2019), *First Things*, available at <https://www.firstthings.com/web-exclusives/2019/05/what-liberalism-lacks> [Accessed 30 April 2020].

³⁶ Deenen, *Why Liberalism Failed*.

³⁷ See Sorab Ahmari, CC Pecknold, Patrick Deenen et al., “Against the Dead Consensus”; Vermeule, “Liturgy of Liberalism”; Adrian Vermeule, “Integration From Within” (2018) II *American Affairs* 202-213; Aaron Kheriaty, “Deaths of Despair” *First Things* (August, 2017) available at <https://www.firstthings.com/article/2017/08/dying-of-despair> [Accessed 10 April 2020].

³⁸ George Duke, “Sovereignty and the Common Good” (2019) 17 *International Journal of Constitutional Law* 66, 75. For arguments discussing the critical importance of the common good to political communities see Gregoire Webber and Paul Yowell, “Introduction: Securing Human Rights through Legislation” in Gregoire Webber, Paul Yowell, Richard Ekins, Maris Kopecke, Bradley W. Miller & Francisco J. Urbina (eds.), *Legislated Rights: Securing Human Rights through Legislation* (Cambridge University Press, 2019) p.3; John Finnis, *Natural Law and Natural Rights* (2nd edn. Oxford University Press, 2011) pp.154-155; Mark C. Murphy, *Natural Law in Jurisprudence and Politics* (Cambridge University Press, 2006) p.64; Michael Sandel, *Liberalism and the Limits of Justice* (2nd ed, Cambridge University Press, 1998); Amy Gutmann, ‘Communitarian Critics of Liberalism’ (1985) 14 *Philosophy & Public Affairs* 308-322.

constitutively, ‘the flourishing of the family, friendship, and other communities’ to which individuals belong.³⁹ The common good is, for many postliberal thinkers, what Murphy dubs a ‘regulative ideal’ the pursuit of which both orients and legitimises political action.⁴⁰

Postliberals, Deenen asserts, do not seek to discard liberalism’s ostensible main commitments - including political liberty and human dignity - but rather approach these concepts with ‘fundamentally different anthropological assumptions’ about things like the purpose of communal life and what constitutes human flourishing.⁴¹ The kind of flourishing postliberals seem to have in mind also appears to be influenced by the natural law tradition. Finnis famously argued that, in this tradition, the human flourishing central to the common good consists of reasonable participation by persons in the basic and incommensurable goods central to humans living well, given their nature and capacities – including life,⁴² friendship in its various forms including neighbourliness and marriage,⁴³ religion,⁴⁴ excellence in play and work, and knowledge (and aesthetic appreciation) of reality.⁴⁵ In other words, the kind of human flourishing that the common good seeks to promote is premised on an objective anthropological understanding of what goods and pursuits are genuinely constitutive of human well-being, and rejects the notion that human flourishing is an ultimately subjective assessment.⁴⁶

Postliberal commentators and scholars have variously advocated: closer links between the political morality guiding officials and Judeo-Christian ethics; restricting obscenity and pornography; tackling economic inequality; safeguarding the environment; bolstering domestic manufacturing and industry; creation of dignified blue-collar work; bolstering workers’ rights and control over economic life; curbing corporate power and influence over politics; and implementing socio-economic policies geared to marriage, family formation, child rearing, and familial stability, such as a more generous welfare and healthcare system. More generally, postliberals would have public authorities regard themselves as having a

³⁹ John Finnis, “Limited Government” in (ed.) John Finnis, *Human Rights & Common Good, Collected Essays: Volume III* (Oxford University Press, 2013) p.90.

⁴⁰ Murphy, *Natural Law in Jurisprudence and Politics* pp.64-65.

⁴¹ Deenen, *Why Liberalism Failed* p.23.

⁴² Including ‘component aspects of its fullness: health, vigour, and safety’. Finnis, “Limited Government” 88.

⁴³ John Finnis, “Legal Reasoning as Practical Reason” in (ed.) John Finnis, *Reason in Action Collected Essays: Volume One* (Oxford University Press, 2013) p.213.

⁴⁴ Described by Finnis in a non-sectarian sense as broadly capturing ‘harmony with the widest reaches and *ultimate source* of all reality, including meaning and value.’ Finnis, “Legal Reasoning as Practical Reason” p.213.

⁴⁵ Finnis, “Legal Reasoning as Practical Reason” p.213.

⁴⁶ Finnis, “Legal Reasoning as Practical Reason” p.213.

critical subsidiary role in assisting families and local communities form virtuous citizens oriented to pursuing flourishing in themselves, others, and the polity as a whole.⁴⁷

It should be obvious that none of the arguments that postliberals direct against economic, social and political liberalism, or for the common good, is original. Instead, what is novel about the emerging postliberal wing of conservative thought in the US is that the ideas being advanced are generating heated debate in the public arena and elite political and juridical debates,⁴⁸ in a manner perhaps not seen since the New-Deal era, where the influence of Catholic Social teaching was clearly discernible in President Roosevelt's ambitious New Deal-era socio-economic proposals.⁴⁹

This section has outlined the growing political dissension within conservative politics about the appropriate ends of political authority. Given both the centrality of the Constitution to American public life and the sheer scale of the postliberal rejection of the fusionist coalition's disposition toward state power, it is unsurprising the foregoing debates have rapidly bled into the legal realm and into questions of constitutional law and theory.⁵⁰ More concretely, what has emerged is a fundamental challenge to one of the most prized achievements of the fusionist political project: a rejection of the predominant place of originalism in the American conservative legal tradition.

Introducing Common Good Constitutionalism

Originalism

Originalism has spawned a veritable cottage-industry of scholarship discussing its various iterations and their merits and drawbacks.⁵¹ Broadly speaking, the predominant strand of

⁴⁷ See e.g. Oren Cass, Marco Rubio et al. "Conservatives Should Ensure Workers a Seat at the Table" (6 September 2020), *American Compass*, available at <https://americancompass.org/essays/conservatives-should-ensure-workers-a-seat-at-the-table/> [Accessed 10 October 2020]; Gladden Pappin, "Corporatism for the Twenty-First Century" (2020) IV *American Affairs*; Julius Krein, "The Real Class War" (2019) III *American Affairs*; Ahmari, Pecknold, Deenen et al., "Against the Dead Consensus"; Vermeule, "Integration From Within"; Deenen, *Why Liberalism Failed*; Adrian Vermeule, "Liturgy of Liberalism".

⁴⁸ Marco Rubio, "Common Good Capitalism and the Dignity of Work", (5 November 2019), *Public Discourse*, available at <https://www.thepublicdiscourse.com/2019/11/58194/> [Accessed 15 April 2020]; Emma Green, "Josh Hawley's Mission to Reshape the GOP" (24 November 2019), *The Atlantic*, available at <https://www.theatlantic.com/politics/archive/2019/11/josh-hawley-trumpism-gop/602365/> [Accessed 30 June 2020]

⁴⁹ Harold Meyerson, "God and the New Deal" (22 November 2004) *The American Prospect*, available at <https://prospect.org/features/god-new-deal/> [Accessed 12 August 2020].

⁵⁰ See Sanford Levinson, *Constitutional Faith* (Princeton University Press, 2011).

⁵¹ Lawrence Solum, "What is originalism? : the evolution of contemporary originalist theory" In Grant Huscroft & Bradley W. Miller (eds.), *The Challenge of Originalism: Essays in Constitutional Theory* (Cambridge University Press, 2011); Daniel A. Farber, "The Originalism Debate: A Guide for the Perplexed", (1989) 49 *Ohio State Law Journal* 1085, 1086-1087.

originalism⁵² requires officials to approach constitutional interpretation by discerning the Constitution's original public meaning – how a textual provision would be understood by a reasonable observer of the time - and applying it to determine the appropriate scope of political branch action or content of constitutional rights. Done consistently and conscientiously, originalism is said to safeguard several important normative principles central to the US political tradition.⁵³ It is said to guarantee majoritarian democracy and the rule of law by subordinating judicial political and ideological preferences to fixed and stable legal rules.⁵⁴ Proponents maintain that it also respects the popular sovereignty of '*We, the People*', as only the people themselves can amend and update the Constitution consistent with their moral lights via the Article V amendment process, while unelected judges are prevented from effecting *de facto* amendments through innovative interpretations. Spear-headed by senior judges like Judge Robert Bork,⁵⁵ Justices Antonin Scalia⁵⁶ and Clarence Thomas,⁵⁷ influential academics, and powerful legal networks like the Federalist Society, in the space of 40 years originalism travelled from the margins of constitutional theory⁵⁸ to become a favoured interpretive method of several Supreme Court justices.

Since its rise, federal courts have deployed originalism to potent effect. For example, they have used originalist interpretations of the First Amendment's protection of speech to invalidate restrictions on campaign finance spending by corporations,⁵⁹ and to strike down a statutory requirement for non-union public sector workers to pay union fees.⁶⁰ In *Heller v District of Columbia*⁶¹ the Supreme Court (in)famously interpreted the Second Amendment to find an individual right to bear firearms largely beyond federal regulation, unsettling decades of precedent. Several judges have also pressed originalist arguments to try to restrict or hinder the federal government's ability to engage in regulatory tasks; attempting to cabin the scope of federal law-making power,⁶² the extent of statutory power delegable to the executive,⁶³ and the

⁵² Lawrence B. Solum, "Originalism and the Unwritten Constitution" (2013) University of Illinois Law Review 1935, 1936.

⁵³ Jeffrey Pojanowski and Kevin Walsh, "Enduring Originalism" (2016) 105 Georgetown Law Journal 97, 102.

⁵⁴ See Scalia, 'Originalism: The Lesser Evil'.

⁵⁵ Robert Bork, *The Tempting of America: The Political Seduction of the Law* (Free Press, 1997).

⁵⁶ Scalia, "Originalism: The Lesser Evil"; Antonin Scalia, *A Matter of Interpretation* (Princeton University Press 1997).

⁵⁷ Ralph Rossum, *Understanding Clarence Thomas: The Jurisprudence of Constitutional Restoration* (Kansas University Press, 2014).

⁵⁸ Greene, "Selling Originalism"; Jamal Greene, *Heller High Water: The Future of Originalism*, (2009) 3 Harvard Law & Policy Review 325.

⁵⁹ *Citizens United v. Federal Electoral Commission* (2010) 558 U.S. 310.

⁶⁰ *Janus v. Federation of State, County, and Municipal Employees* (2018) US. 585.

⁶¹ (2008) 554 U.S. 570.

⁶² *Lopez v US* (1995) 514 U.S. 549; *National Federation of Independent Business v. Sebelius* (2012) 567 U.S. 519.

⁶³ Although the Court's lax approach to the non-delegation doctrine survived unscathed in *Gundy v. United States* (2019) 588 U.S. the four Republican-appointed justices expressed a desire to revisit the extent of statutory power delegable from Congress to the executive in a future case.

level of judicial deference shown to administrative agencies' interpretation of statutes.⁶⁴ Originalism provides, as Metzger suggests, the constitutional heavy artillery for anti-administrative actors trying to blast apart the capacity of the administrative state.⁶⁵

For its intellectual defenders, originalism is thus both normatively sound as a principled theory of interpretation - due to its commitment to valuable principles like majoritarian democracy, the rule of law, and popular sovereignty, and in practice has the happy coincidence of producing results broadly consistent with the ostensible understanding of the founders and conservative values such as limited government and a strong emphasis on individual liberties.

Common-good constitutionalism

Against the backdrop of intense intellectual debate about the future of conservative political thought and originalism's predominance as a form of constitutional interpretation, in 2020 Adrian Vermeule published a series of essays advocating a seemingly radical proposition: that conservatives should abandon originalism and embrace an alternative approach to constitutional interpretation more conducive to affirmatively securing the common good.⁶⁶

The biggest problem with originalism, Vermeule suggests, is its ultimately agnostic attitude to the common good; there is no guarantee that its consistent application 'will necessarily or even predictably track' the common good.⁶⁷ Indeed, given that originalism ostensibly binds itself to the original public meaning of a provision, more or less regardless of practical consequences, it is 'always possible, indeed likely, that the common good...will prescribe an interpretation that cannot be justified in originalist terms'.⁶⁸ In other words, the practical application of originalism might demand an approach to the scope of constitutional rights, or governmental power, which makes the state much less able to use its capacity to regulate socio-economic life

⁶⁴ See Cass Sunstein and Adrian Vermeule, "Libertarian Administrative Law" (2015) 82 University of Chicago Law Review 393.

⁶⁵ Gillian Metzger, "Foreword: 1930's Redux: The Administrative State Under Siege" (2017) 131 Harvard Law Review 1, 42-43.

⁶⁶ Vermeule, "Common Good Constitutionalism"; Vermeule, "Deference and the Common Good"; Vermeule, "On Common Good Originalism"; Vermeule, "Common Good Constitutionalism: A Model Opinion".

⁶⁷ Vermeule, "Common Good Constitutionalism". Vermeule has also suggested it is not at all clear that the Court's track record of articulating the Constitution's 'original public meaning' has even been persuasive on its own terms. Vermeule argues that the libertarian streak of contemporary originalist jurisprudence is a false modernist projection of contemporary values onto the founding generation. Thus, for Vermeule it may well be that originalism, if shorn of its contemporary libertarian biases, will actually frequently track the common good. But for Vermeule this still would not solve originalism's main problem - which is that this approach still 'leaves originalism in ultimate control, hoping that the original understanding will happen to be morally appealing' and in sync with the requirements of the common good. See Vermeule, "Common Good Constitutionalism: A Model Opinion"; Vermeule, "On 'Common Good Originalism'".

⁶⁸ Vermeule, "Common Good Constitutionalism".

for the common good. Vermeule makes the case that, for those who consider the proper end of political authority and government action to be making determinations consistent with the common good, embracing an approach to constitutionalism which is largely agnostic to this end in its application, is a counterintuitive stance.

Drawing on the classic legal and natural law tradition, Vermeule argues that officials should not approach interpretation in a manner concerned with divining the meaning and effect of a constitutional provision based on what the public of the adopting generation thought it meant, but in a manner openly morally infused, and open to state institutions using their authority to promote the common good - based on contemporary socio-economic conditions. This approach to constitutional interpretation Vermeule dubs '*Common-good constitutionalism*', which has several core operative principles quite distinct from originalism, including: openness to interpreting sources of law in light of substantive moral principles conducive to the common good; belief that the proper end of political authority is promoting the common good and that public authorities should enjoy capacious discretion when making determinations about how best to do so, and flexibility about institutional design and allocation of power between state institutions.

Vermeule's essay is broad and rich in the concepts it invokes, but its brevity means that it only offers 'broad strokes' in respect of its main arguments.⁶⁹ My aim in this part is thus to flesh out the core principles of common good constitutionalism to allow for greater understanding of the intellectual foundations of Vermeule's arguments. I will discuss each in turn and attempt, where possible, to dig deeper into these intellectual foundations and assumptions where light can be shed by the natural law tradition and Vermeule's other works on administrative law, constitutional law, and political theory.

Substantive moral readings of Constitution

When it comes to making concrete determinations of what the Constitution demands, common-good constitutionalism insists that officials, across all branches of government, approach interpretation by reading 'substantive moral principles that conduce to the common good...into the majestic generalities and ambiguities' common to written constitutional text.⁷⁰ This makes

⁶⁹ Vermeule, "Common Good Constitutionalism".

⁷⁰ Vermeule, "Common Good Constitutionalism".

it a far ‘more direct, more openly moral’ approach to constitutionalism than originalism.⁷¹ It is, Vermeule asserts, in fact ‘methodologically Dworkinian’ in its express acceptance that legal adjudication, and the practice of interpretation, cannot be divorced from questions of political morality and the *purpose* of law and government.⁷²

Constitutional adjudication and decision-making, as Dworkin famously argued, frequently demand that officials choose interpretations of under-determinate posited sources of law - statutes, executive orders, constitutional provisions, prior judicial precedents etc - from a range of plausible meanings. Dworkin argued that in making determinations between competing legal interpretations judges sometimes will, and should, read legal materials in light of their good-faith understanding of a polity’s background principles of political morality; principles which both *fit* and best *justify* those sources and precedents by placing them in their best light morally speaking.⁷³ In Vermeule’s account of common-good constitutionalism, the relevant background principles officials ought to draw upon are those belonging to the natural law legal tradition like the legitimacy of strong rule to promote public welfare, respect for subsidiarity, the importance of core rule of law values to official action, and the primacy of the common good as the orienting basis for legitimating political authority.⁷⁴

Vermeule pre-emptively rejects the contention that adopting this approach would represent an ‘alien irruption in the American legal tradition by appealing to foreign principles of political morality and legal practice, and points to an extensive body of case law from as early as the 19th century, where courts consistently reached constitutional interpretations supportive of giving ‘capacious public authority to regulate property, economic activity and even personal liberty for public purposes’ and the common good.⁷⁵ The close link that originalism’s proponents tend to draw between the founders’ views of the appropriate role of the state, and contemporary libertarian values hostile to a robust state role over socio-economic life is, Vermeule argues, a modernist one ‘falsely projected backwards in time’.⁷⁶ In other words, it is not the case that Vermeule’s proposals are totally inconsistent with a measure of fidelity both jurisprudence and to principles of political morality present since the American Founding and early years of the Republic.

⁷¹ Vermeule, “Common Good Constitutionalism”.

⁷² Vermeule, “Common Good Constitutionalism”..

⁷³ See Ronald Dworkin, *Laws Empire* (Harvard University Press, 1986).

⁷⁴ Vermeule, “Common Good Constitutionalism”.

⁷⁵ Vermeule, “Common Good Constitutionalism: A Model Opinion”.

⁷⁶ Vermeule, “Common Good Constitutionalism: A Model Opinion”..

What would a common good constitutionalism approach look like practically in the context of interpreting the US Constitution? As noted above, Vermeule suggests that, for a start, it would involve officials reading vague clauses in an openly morally-infused way, guided by the above principles of political morality, to reach determinations consistent with the common good. Vermeule mentions the preambular text with its references to justice and a more perfect union; the general welfare clause; and the fourteenth amendment's dedication to liberty, and equality before the law, as good examples of provisions which can all be read in light of the above principles of political morality, to give the state ample authority to pursue the social and economic conditions necessary for human flourishing. One can also probably include here in a similar vein other open-ended provisions like the executive power clause, the commerce clause, and Section 5 of the 14th amendment, all of which concern the scope of governmental power and the duty to enforce constitutional guarantees like life, liberty, and equal protection of the laws.

Vermeule suggests that in some cases, interpretation of these kind of provisions by officials this will no doubt lean toward respecting subsidiarity by assisting individual/familial autonomy and solidarity to pursue the good life, through giving presumptive legal favour to 'Unions, guilds and crafts, cities and localities, and other solidaristic associations.'⁷⁷ In other circumstances, interpretation suffused with the above kind of principles will demand affording the state capacious authority to take a more direct hand in regulating socio-economic affairs to protect the life, liberty, health, and safety of the public where individuals and voluntary associations are ill-equipped to do so; such as protecting citizens from ills like the 'injustices of market forces, from employers who would exploit them as atomized individuals, and from corporate exploitation and destruction of the natural environment.'⁷⁸ In both scenarios, Vermeule insists that common good constitutionalism would exhibit 'a candid willingness to 'legislate morality'' because one of its core premises is that 'promotion of morality is a core and legitimate function of authority' given its link to securing the common good.⁷⁹ Thus, when considering the scope of the federal government's power to fund and provide public services such as healthcare, to regulate deadly firearms, or protect public health and morality, constitutional argument will turn on more explicitly moral concerns rather than what

⁷⁷ Vermeule, "Common Good Constitutionalism".

⁷⁸ Vermeule, "Common Good Constitutionalism".

⁷⁹ Vermeule, "Common Good Constitutionalism".

amorphous concepts like ‘speech’, ‘commerce’, ‘welfare’, ‘bear arms’ ‘equal protection’ or ‘liberty’ meant to the reasonable citizen during the 18th and 19th centuries.

It is also heavily distinct from interpretive methods which *are* comfortable engaging with substantive moral principles when interpreting open ended provisions, but where those principles are oriented to a master-value like individual autonomy. Vermeule candidly acknowledges that an approach to constitutionalism based on the premise that state power is cabined by the principle ‘that all individuals are deserving in equal measure of personal autonomy and freedom to “define [their] own concept of existence”’⁸⁰ through enjoyment of individual rights like speech, liberty, and property - is utterly inconsistent with his proposal.⁸¹ Jurisprudential approaches to state power or rights based on the notion that individuals have a constitutional entitlement to ‘define one’s own concept...of meaning, of the universe, and of the mystery of human life’ says Vermeule, will necessarily ‘fall under the ax’,⁸² given common good constitutionalism’s radically different animating moral principles, as will libertarian approaches to property rights and commercial speech.

The primacy of common good as the end of political authority

In the vein of the natural law tradition, common-good constitutionalism openly, and emphatically, recognises pursuing the conditions required for the ‘common good’ to be the proper end of political authority⁸³ and that promoting a ‘substantive vision of the good is, always and everywhere, the proper function of rulers.’⁸⁴ On this view, law has a key role in facilitating things necessary for the common good that ‘solitary persons and other institutions cannot’,⁸⁵ such as protecting the peace, allowing people to coordinate their activities and lives through reference to authoritative directives that provide exclusionary reasons for action, and making possible cooperation on complex socio-economic undertakings conducive to individual, familial, and communal flourishing. Legal ordinances promulgated by political authorities with the capacity to settle co-ordination problems offer a polity - so long as those ordinances are respectful of core moral precepts - a good and effective way to authoritatively

⁸⁰ Lawrence Tribe, ‘Equal Dignity: Speaking its Name’ (2015) 129 Harvard Law Review 16, 22 quoting Kennedy J. in *Planned Parenthood of South Eastern Pennsylvania v. Casey* (1992) 505 U.S. 833, 851.

⁸¹ Vermeule, “Common Good Constitutionalism”.

⁸² Vermeule, “Common Good Constitutionalism”..

⁸³ Finnis, “Limited Government” p.90.

⁸⁴ Vermeule, “Common Good Constitutionalism”.

⁸⁵ Jeffrey Pojanowski and Kevin Walsh, “Enduring Originalism” (2016) 105 Georgetown Law Journal 97, 121.

make *determinations* from amongst countless possibilities how a community ought to concretely pursue the diverse and open-ended conditions required for human flourishing.⁸⁶

While Vermeule does not explicitly outline in detail what he understands the common good to consist of, it is clear he is invoking the natural law tradition. As noted above, in this tradition the common good is broadly understood as a state of affairs in which ‘each individual within a political community and the political community as a whole is flourishing’;⁸⁷ a state of affairs in which the conditions of ‘peace, justice, abundance, health, and safety’ mentioned by Vermeule are critically important constitutive aspects.⁸⁸ Common good constitutionalism does not, therefore, proceed on the basis that the proper role of the state is to maximise individual autonomy by minimising its power over social and economic life, nor to maximise its powers over social and economic life to minimise fetters on individual autonomy. Rather, it is to promote the ensemble of conditions - social, economic, and moral - required for the human flourishing of individuals, their families, and the political community as a whole.⁸⁹

Common good constitutionalism’s master commitment means that its attitude to individual liberties and the scope of governmental power will often be markedly different from a good deal of doctrine fashioning the constitutional status quo, which Vermeule has argued elsewhere sometimes exhibits strong anti-statist undercurrents.⁹⁰ The primacy of the common good as the appropriate end of political authority would entail significant conceptual shifts in approaching checks and balances, the separation of powers, and the scope of legislative power. For example, several justices of the Supreme Court currently interpret these concepts concerned with, above all, minimising abuse of state power and making co-ordinated government action more cumbersome in order to better safeguard individual autonomy.⁹¹ Common good constitutionalism instead favours giving ample room to the political branches to make concrete

⁸⁶ George Duke, ‘The Common Good’ in (eds.) George Duke and Robert P. George, *Natural Law Jurisprudence* (Cambridge University Press, 2017) p.379.

⁸⁷ Duke, “Sovereignty and the Common Good” 75; Murphy, *Natural Law in Jurisprudence and Politics* p.64; Finnis, *Natural Law and Natural Rights* pp.154-155.

⁸⁸ Vermeule, “Common Good Constitutionalism”.

⁸⁹ Finnis, “Reason and Authority in Law’s Empire” p.296.

⁹⁰ See Sunstein and Vermeule, “Libertarian Administrative Law”; Cass Sunstein and Adrian Vermeule, “The New Coke: On the Plural Aims of Administrative Law” (2015) *The Supreme Court Review* 41.

⁹¹ This is an understanding taken by several current conservative justices of the Supreme Court. See, e.g., in *Department of Transportation v. Association of American Railroad’s* (2015) 135 S. Ct. 1225, 1245 Thomas, J., argued that ‘at the center of the Framers’ dedication to the separation of powers was individual liberty.’ In *City of Arlington v FCC* (2013) 569 U.S. 290, 315 Roberts, C.J., in dissent argued that the Framers divided governmental power for ‘the purpose of safeguarding liberty.’ While on the Court of Appeals Gorsuch J. in *Gutierrez-Brizuela v. Lynch*, (10th Cir. 2016) 834 F.3d 1142, 1149 suggested that ‘the founders considered the separation of powers a vital guard against governmental encroachment on the people’s liberties, including all those later enumerated in the Bill of Rights.’

determinations in pursuit of the conditions required to instantiate the common good.⁹² Under common good constitutionalism, constitutional law will define in ‘broad terms the authority of the state to protect the public’s health and well-being’ and protect the weak from ‘scourges of many kinds—biological, social, and economic—even when doing so requires overriding’ the private rights claims of individuals.⁹³

This means that common good constitutionalism is avowedly not anti-statist, like originalism or libertarian strands of conservative legal thought.⁹⁴ It does not, as Vermeule puts it, see strong rule as ‘presumptively suspect’ in the way these traditions do, and it would be reluctant to entertain cramped interpretations of state power based on concerns of potential abuse.⁹⁵ Instead, common good constitutionalism views constraints on power as ‘good only derivatively, insofar as they contribute to the common good’ and facilitate pursuit of subsidiarity and ‘particular human liberties whose protection is a duty of justice’.⁹⁶ Once again, the influence of the natural law tradition is evident here. As Finnis points out, in this tradition state power being ‘limited’ is ‘only to a limited extent a desirable characteristic of government’. This is because it adopts the premise that a state limited in its ability to tackle non-state abuses of social and economic power, and exploitation of the weak and vulnerable, can be highly corrosive to the common good.⁹⁷

The primacy of the common good as the end of political authority also means that the state may find itself, when issuing directives to promote that end, acting against some citizens’ own ‘perceptions of what is best for them’ and their subjective views of the good life.⁹⁸ Once again, Vermeule is working squarely within the natural law tradition, which emphatically does not regard openness to using law to encourage virtue and discourage vice as a badge of contempt for the dignity of the individual. Instead, in this tradition it is said to manifest a desire to remedy distorted views of human dignity, worth, and flourishing, precisely in order to respect these values⁹⁹ in those persons, and to encourage, in Vermeule’s words, formation of ‘desires...better habits, and beliefs that better track’ genuine individual human flourishing and communal

⁹² Vermeule, “Common Good Constitutionalism”.

⁹³ Vermeule, “Common Good Constitutionalism”.

⁹⁴ Sunstein and Vermeule, “Libertarian Administrative Law”.

⁹⁵ Vermeule, “Common Good Constitutionalism”.

⁹⁶ Vermeule, “Common Good Constitutionalism”.

⁹⁷ John Finnis, “Limited Government” p.83.

⁹⁸ Vermeule, “Common Good Constitutionalism”.

⁹⁹ John Finnis, “Human Rights and Their Enforcement” in (ed.) John Finnis, *Human Rights & Common Good, Collected Essays: Volume III* (Oxford University Press, 2011) 38; John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 2011) pp.220-221.

wellbeing.¹⁰⁰ Common good constitutionalism, says Vermeule, views law as an important subsidiary ‘teacher and an inculcator of good habits’ complementary to the primary role played by the family, private associations, and local communities.¹⁰¹

Vermeule’s intellectual reliance on the natural law tradition, and his references to subsidiarity, make it clear that common good constitutionalism’s openness to providing the state with ample power to issue directives to promote the common good, does not assume that the common good will always demand high levels of state intervention. Vermeule instead envisages that the nature and level of appropriate state involvement in socio-economic life will clearly turn on prudential judgments of necessity and proportionality; sometimes demanding respect for subsidiarity and sometimes a more active top-down state role.¹⁰² The most critical practical point on this question from the perspective of common good constitutionalism is that, in either case, there will be a presumption that state officials will have the *capacity* to act whenever and however necessary to protect the common good, and that they will regard such engagement as an entirely legitimate aspect of their function.

Flexibility of institutional design

Vermeule makes it clear that common good constitutionalism’s injunction to promote the common good is not addressed to the work of judges alone, but emphatically institutionally dispersed amongst executive and legislative officials as well.¹⁰³ Common good constitutionalism is more open-ended when it comes to the precise distribution of public power and interpretive authority between the branches. Methodologically speaking, Vermeule’s attitude to the institutional specification of concepts like the separation of powers works downwards from a principled and theoretical understanding of the purpose of government and constitutionalism: to promote the conditions required for the common good. Vermeule has therefore clarified that advocacy of common good constitutionalism is not the same as advocating a particular allocation of institutional and interpretive power between different branches of government.¹⁰⁴ In other words, common good constitutionalism is not synonymous with, for example, a form of judicial supremacy where judges can unseat political branch determinations as unconstitutional by second-guessing their judgments *de novo* in light of their

¹⁰⁰ Vermeule, “Common Good Constitutionalism”.

¹⁰¹ Vermeule, “Common Good Constitutionalism”.

¹⁰² Vermeule, “Common Good Constitutionalism”.

¹⁰³ Vermeule, “Common Good Constitutionalism”.

¹⁰⁴ Vermeule, “Deference and the Common Good”.

own constitutional interpretation suffused with natural law principles.¹⁰⁵ Appropriate distribution of authority is instead a matter of prudential judgment, contingent on the prevailing conditions of the political community and what is best conducive to securing the common good.

That said, in the US context, Vermeule's prolific work on administrative and constitutional law provide clear insight into how he considers institutional and interpretive authority should be allocated, given prevailing conditions in that system. In respect of institutional authority over policy making, in previous works like *The Executive Unbound*¹⁰⁶ and *Law's Abnegation*,¹⁰⁷ Vermeule argued that the separation of power in the United States has evolved dramatically from the founding era: from a legislative-dominated form with a modest executive, to one dominated by a powerful presidency overseeing a potent administrative state whose work is policed on the margins by the legislature and judiciary. This shift, he notes, came over an extended period - not as a consequence of unilateral presidential aggrandisement - but as a voluntary ceding of ever-expanding authority by the judiciary and legislature to the executive and bureaucracy, due to its superior institutional capacity to wield broad and deep discretionary public power to tackle contemporary social and economic problems facing the polity. These developments were also cemented by continuous cycles of democratic politics which appointed officials who were content with the legitimacy of the growing authority of the presidency and bureaucracy, even if some conservative actors expressed performative disquiet at its expanding scope and power.¹⁰⁸

From a normative perspective, Vermeule argues that these developments are welcome, as without such authority, the state's capacity to regulate socio-economic life and respond to policy issues for the general welfare would be seriously dented. Another reason for Vermeule's sanguinity about an executive-led separation of powers is that, unlike diffuse and procedurally cumbersome legislative assemblies, or low-capacity judicial bodies, hierarchical bureaucracies with very wide regulatory reach - when commanded by an energetic, unified, and motivated political executive - are better suited to promoting the integration of substantive moral politics

¹⁰⁵ Vermeule, "Deference and the Common Good".

¹⁰⁶ Eric Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (Oxford University Press, 2010).

¹⁰⁷ Adrian Vermeule, *Law's Abnegation: From Law's Empire to the Administrative State* (Harvard University Press, 2016).

¹⁰⁸ See Stephen Skowronek, "The Conservative Insurgency and Presidential Power: A Development Perspective on the Unitary Executive" (2009) 122 *Harvard Law Review* 2071.

into state directives.¹⁰⁹ From the perspective of common good constitutionalism then, a core advantage of an executive-led separation of powers above other ways of allocating authority, is that it allows the executive to better infuse the technocratic work of the administrative state with an explicit moral and political vision linked to the common good, aligning its underlying ideological sympathies and extensive regulatory outputs to goals conducive to this end. As Weber pithily put it, impersonal bureaucracies are a potent and useful institutional technology for political actors as they can be ‘easily made to work for anybody who knows how to gain control over it’.¹¹⁰ These arguments, I suggest, offer the fuller intellectual backdrop to Vermeule’s brief observation in his essay that common good constitutionalism in the US will favour a government structure characterised by ‘powerful presidency ruling over a powerful bureaucracy’.¹¹¹

In respect of authority to interpret the Constitution, Vermeule’s extensive writings on public law suggest that he operates from the normative premise that judges should broadly adopt a disposition of Thayerian deference¹¹² to Congress. In other words, they should reserve to themselves a relatively modest but still important role in policing the outer bounds of congressional interpretive authority by curbing clearly mistaken or bad faith interpretations of the Constitution.¹¹³

Critical Analysis: An apologia for authoritarianism?

The previous section endeavoured to outline and elaborate the core principles and commitments of common good constitutionalism. This part now shifts gear from the explanatory to the critical, through engaging and probing the initial wave of criticism directed at Vermeule’s arguments. His interlocutors, including several prominent public law scholars, have responded with several serious complaints, the most common being a critique along the lines that common good constitutionalism is a cynical cover to pivot the US constitutional order

¹⁰⁹ Vermeule, “Integration From Within”; Adrian Vermeule, “Ralliement: Two Distinctions”, (16 March 2016), *The Josias*, available at <https://thejosias.com/2018/03/16/ralliement-two-distinctions/> [Accessed 20 April 2020].

¹¹⁰ Max Weber, *Essays in Sociology: Bureaucracy* in (ed) Mortimer Adler, *Great Books of the Western World Volume 58* (Encyclopaedia Britannica, 1990) 162.

¹¹¹ Vermeule, “Common Good Constitutionalism”.

¹¹² James Bradley Thayer, “The Origin and Scope of the American Doctrine of Constitutional Law” (1893) 7 *Harvard Law Review* 129-156.

¹¹³ See Adrian Vermeule, *Judging Under Uncertainty: an Institutional Theory of Legal Interpretation* (Harvard University Press, 2006).

toward a polity characterised by extreme authoritarianism or even fascism.¹¹⁴ These are very serious charges indeed - but are they made out?

Is common good constitutionalism Schmittian?

For critics of common good constitutionalism who see the proposal as a highly elaborate apologia for authoritarianism, Vermeule's obvious antipathy to liberalism, and his extensive previous engagement¹¹⁵ with the works of Carl Schmitt are two smoking guns. I suggest, in contrast, Vermeule's engagement with Schmitt's anti-liberal thought is only marginally related to the core substance of common good constitutionalism. Instead, the most convincing reading of Vermeule's proposal is that its core moral commitments owe a profound intellectual debt to the likes of Aristotle, Aquinas, Finnis, and the *Compendium of the Social Doctrine of the Catholic Church*¹¹⁶ – but not Schmitt.

There are admittedly *some* Schmittian influences, especially in Vermeule's references to the functional value of a powerful executive and his clear belief in the general inability of liberalism to secure the common good.¹¹⁷ Like Schmitt, Vermeule would patently agree with the proposition that liberalism's overriding emphasis on individual autonomy and liberty is a destabilising force inimical to human flourishing and the common good. Vermeule also clearly finds analytical power in Schmitt's argument that political conflicts are ultimately theological and based on conflicting fundamental assumptions about the purpose of human life; and that liberalism's attempt to submerge political disagreement over questions of how to live consistently with truth and goodness is an impoverished way to organise communal life.¹¹⁸ But this engagement with Schmitt is strictly negative, with his arguments being used to attack aspects of the liberal tradition.

¹¹⁴ Barnett, "Common-Good Constitutionalism Reveals the Dangers of Any Non-originalist Approach to the Constitution"; Epstein, "The Problem with Common good Constitutionalism"; Caesar, "Adrian Vermeule's Sixteenth Century Constitutionalism"; Epps, "Common-Good Constitutionalism Is an Idea as Dangerous as They Come"; Dyzenhaus, "Schmitt in the USA".

¹¹⁵ Adrian Vermeule, "Rules, Commands and Principles in the Administrative State" (Forthcoming, 2021) Yale Law Journal Forum; Vermeule, "All Human Conflict is Ultimately Theological"; Eric A. Posner and Adrian Vermeule, "Demystifying Schmitt" in Jens Meierhenrich and Oliver Simons (eds.), *The Oxford Handbook of Carl Schmitt* (Oxford University Press, 2016); Posner and Vermeule, *The Executive Unbound*.

¹¹⁶ Pontifical Council for Justice and Peace, *Compendium of the Social Doctrine of the Catholic Church* (Bloomsbury, 2006).

¹¹⁷ Arguments advanced by Schmitt in works such as: Carl Schmitt, *Dictatorship: from the origin of the modern concept of sovereignty to proletarian class struggle* (Translated by Michael Hoelzl and Graham Ward, Polity Press, 2014); Carl Schmitt, *Political Theology: Four Chapters on the Concept of the Political* (Translation by George Schwab, University of Chicago Press, 2005); Schmitt, *The Crisis of Parliamentary Democracy*.

¹¹⁸ Vermeule, "All Human Conflict is Ultimately Theological".

In contrast, the positive animating moral core of common-good constitutionalism is certainly not Schmittian. It has, most obviously, nothing to do with promoting the kind of concrete political order Schmitt disgraced himself by eventually shilling for: a sovereign plebiscitary dictatorship which constituted a homogenous polity based on a union of ‘state, movement, and people’ linked by national and racial affinity, and rabid anti-Semitism.¹¹⁹ Vermeule’s arguments are instead squarely within the intellectual bounds of the natural law tradition, with its close linkage of legal interpretation to principles of political morality, the importance of rule of law values to guiding state action, and the primacy of the common good and human flourishing to justifying political authority. Whatever Schmitt’s influence on Vermeule’s critique of liberalism and functional embrace of a strong executive as a useful tool to promote the common good, the former’s ‘hopelessly decayed’ ‘moral sense and spirit’ are, on any reasonable reading, not the wellspring of the intellectual inspiration in the latter’s core arguments about constitutional government and its purpose.¹²⁰

Executive predominance not authoritarianism

What about Vermeule’s reference to common good constitutionalism being open to a powerful presidential-led bureaucracy and its embrace of strong rule? Are these assertions short hands for authoritarianism? Again, while Vermeule is sanguine about strong rule to promote the common good, I suggest it is a stretch to equate this with the kind of authoritarianism conceptually set in opposition to constitutionalism in political theory. What sets apart conceptually a political executive in a constitutional democracy from its counterpart in an authoritarian regime, is that the latter is more likely to embrace outright executive supremacy, as opposed to executive predominance. In other words, executives in authoritarian regimes are much more likely to be shorn of constraints such as commitment to legality, constitutional limits, or democratic controls imposed by law.¹²¹

At its most extreme, in a system characterised by executive supremacy all political decisions can potentially be made by a ‘single decision-maker, whose decisions are both formally and practically unregulated by law.’¹²² Absolute monarchies, Marxist-Leninist party dictatorship,

¹¹⁹ See Carl Schmitt, “On the Three Types of Juristic Thought”, translated by Joseph Bendersky (Praeger Publishers, 2004).

¹²⁰ Vermeule, “All Human Conflict is Ultimately Theological”.

¹²¹ Gabor Attila Toth, “Constitutional Markers of Authoritarianism” (2018) 11 *Hague Journal on the Rule of Law* 37, 48; Mark Tushnet, “Authoritarian Constitutionalism” (2015) 100 *Cornell Law Review* 391-461; Mark Tushnet, “Authoritarian Constitutionalism: Some Conceptual Issues” in (eds.), Tom Ginsburg and Alberto Simpser, *Constitutions in Authoritarian Regimes* (Cambridge University Press, 2014) pp.36-48; Guillermo O’Donnell, “Horizontal Accountability in New Democracies” (1998) 9 *Journal of Democracy* 112, 119.

¹²² N.W. Barber, *Principles of Constitutionalism* (Oxford University Press, 2018) pp.76-77.

fascistic regimes based on leadership worship, and military juntas are paradigmatic examples.¹²³ A system characterised by executive supremacy sometimes accommodates very weak commitment to legality, constitutional limits, or democratic controls imposed by law.¹²⁴ This is typically done as a cynical commitment for strategic reasons: to ease coordination within the authoritarian ruling group, or to provide credibility signals to outsider economic or political observers.¹²⁵

Nothing in Vermeule's proposal advocates this kind of political executive. Common good constitutionalism does not involve abandoning rights guaranteed by positive law, nor checks and balances which allocate the state's institutional authority between different branches of government. For example, while Vermeule is an unapologetic defender of a robust executive-led administrative state empowered to act for the common good, it would caricature his position to argue that he calls for law's *complete* abnegation to it or a rejection of checks and balances. His extensive writings on public law instead highlight that Vermeule operates from the normative premise that judges should broadly adopt a disposition of Thayerian deference¹²⁶ to the presidential led-administrative state and Congress when it comes to administrative action and constitutional interpretation respectfully, reserving to themselves a relatively modest but still important role policing their outer bounds¹²⁷ by curbing the clearly irrational, capricious, or ultra vires.¹²⁸ For Vermeule, judges should play a modest reviewing role not to facilitate untrammelled rule by the political branches, but because of their institutional unsuitability for competently subjecting the work of the political branches to searching reasonableness review, or rigorously second-guessing the complex trade-offs between incommensurable principles and values like legality, technocratic competence, and democratic accountability that these actors make when issuing ordinances for the common good.¹²⁹ Similarly, while Vermeule clearly thinks the legislature should play second policy fiddle to the executive-led administrative state due to its own institutional short-comings, Congress is not entirely side-

¹²³ Toth, "Constitutional Markers of Authoritarianism" 48.

¹²⁴ Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press, 2019) p.16; Mark Tushnet, "Authoritarian Constitutionalism" 431; Tamir Mustafa and Tom Ginsburg, "Introduction: The Functions of Courts in Authoritarian Politics", in *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge University Press, 2012) p. 4.

¹²⁵ Mustafa and Ginsburg, "Introduction: The Functions of Courts in Authoritarian Politics" p. 4.

¹²⁶ Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law".

¹²⁷ Vermeule, "Rules, Commands and Principles in the Administrative State"; Vermeule, *Law's Abnegation*.

¹²⁸ Adrian Vermeule and Jacob Gersen, "Thin Rationality Review" (2016) 114 Michigan Law Review 1355.

¹²⁹ Sunstein and Vermeule, "The New Coke: On the Plural Aims of Administrative Law" 86-87; Adrian Vermeule, "Local and Global Knowledge in the Administrative State" in David Dyzenhaus and Thomas Poole (eds.), *Law, Liberty and State: Oakeshott, Hayek and Schmitt on the Rule of Law* (Cambridge University Press, 2015).

lined given the executive's need for it to authorise the broad delegations of statutory authority and financial means required for it to function effectively.

Finally, Vermeule has written extensively on the need for all officials – especially those in the executive branch - to aspire to act in accordance with what he and Sunstein elsewhere refer to as the 'internal morality of administrative law'.¹³⁰ These are the moral principles said to be internally embedded in US administrative law which help 'unify a disparate array of judge-made doctrines' and put them in an attractive moral light,¹³¹ including: the requirement that administrators issue decisions and regulations which are transparent, consistently applied, understandable, not abusively retroactive, possible to comply with, and non-contradictory.¹³² These principles broadly track the criteria that Fuller famously argued are constitutive of law's 'internal morality', which are needed to have an efficacious legal system governed by the rule of law and not arbitrary will.¹³³ Without such principles, serious problems from the standpoint of principles like 'democratic accountability, liberty, and welfare', and thus the common good, will emerge if 'public officials have the discretion to do whatever they want, if citizens have to guess about what the law is, and if people are unable to plan their affairs.'¹³⁴

Cumulatively, these features of common good constitutionalism put a great deal of water between Vermeule's vision of robust political authority, and an authoritarianism characterised by executive supremacy. Far from being regarded as a poor expression of constitutionalism, common good constitutionalism can be regarded as part of the intellectual tradition of positive constitutionalism – a tradition Vermeule has previously supported¹³⁵ - which regards constitutional law not only as a means of constraining state power to protect the individual, but as also having the critical functional purpose of generating, sustaining, empowering and co-ordinating state action for the common good.¹³⁶

Conclusion on initial critiques

¹³⁰ Cass Sunstein and Adrian Vermeule, *Law and Leviathan: Redeeming the Administrative State* (Harvard University Press, 2020); Cass Sunstein and Adrian Vermeule, "The Morality of Administrative Law" (2018) 131 Harvard Law Review 1925, 1927.

¹³¹ Sunstein and Vermeule, "The Morality of Administrative Law" 1927.

¹³² Sunstein and Vermeule, "The Morality of Administrative Law" 1926.

¹³³ See Lon Fuller, *The Morality of Law* (Yale University Press, 1964).

¹³⁴ Sunstein and Vermeule, "The Morality of Administrative Law" 1966.

¹³⁵ See generally Adrian Vermeule, *The Constitution of Risk* (Cambridge University Press, 2014).

¹³⁶ See also Barber, *The Principles of Constitutionalism* pp.2-6; Waldron, *Political Political Theory* pp.30-36; Sotirios Barber, *Welfare and the Instrumental Constitution* (1997) 42 American Journal of Jurisprudence 159.

Many initial reactions to common-good constitutionalism thus misfire by maligning it as an anti-constitutional apologia for authoritarianism or fascism. Depending on one's ideological commitments, there will of course be pressing reasons to disagree with it as an interpretive method and legal tradition. It is clear that the concept's orienting value is not maximising autonomy or liberty but securing the common good. As such, while individual rights and liberties - rightly understood - are viewed as important aspects of human flourishing, common good constitutionalism regards their individual exercise as subordinate to other aspects of the common good, and therefore easier to justify regulating than under a liberal constitutionalist approach to constitutionalism more suspicious of state power.

Proponents of the classic liberal or libertarian legal tradition will certainly have much to dislike about common-good constitutionalism's sanguinity about robust state power, as will political liberals who will invariably find it profoundly unreasonable due to its willingness to have the state promote thick conceptions of the good. But to suggest that encouraging officials to read substantive principles of political morality associated with the natural law tradition into open-ended constitutional provisions, or to interpret constitutional structure to provide public authorities with capacious authority to protect the weak and act for the common good—is a slippery road to authoritarian extremism unbound from law—is not a measured response.

Critiques starting from the premise that common good constitutionalism is effectively a form of anti-constitutional authoritarianism or fascism are not only inaccurate, but deeply unhelpful to fruitful engagement over the core questions that arguments advanced by scholars like Vermeule raise for public lawyers. These important questions include what the ultimate purpose of constitutional government is; what the best method of interpreting constitutional provisions ought to be; and whether forms of constitutionalism self-consciously separated from liberalism are necessarily watered down and diluted version of that tradition. These questions are even more pressing given the widespread perception that liberal constitutionalism is increasingly under strain in many democracies. At the beginning of this essay, I raised the prospect of common good constitutionalism finding appeal outside the United States in regimes rejecting liberal constitutionalism and seeking an alternative. Many will be dislike this possibility and reject common good constitutionalism as a normatively defensible form of constitutionalism even when its core principles are understood correctly, but counterarguments should provide convincing competing responses to the foregoing questions, not unwarrantedly invoke the spectre of dictatorship or fascism.

The Future of Common good Constitutionalism

What can be said about the potential future of common good constitutionalism at this early juncture? Many in conservative and liberal legal circles will no doubt hope it dies a swift death and does not proceed to pose a threat to the originalist or living constitutionalist traditions. But for those sympathetic to the postliberal agenda of combining social conservatism with a solidaristic attitude to economic regulation and redistribution, and who do not regard safeguarding individual liberty or self-determination as the proper end of government, it may represent a more theoretically sound and normatively justifiable approach to constitutionalism than either of the dominant schools. But given how well entrenched the other schools of thought currently are, proponents of common good constitutionalism undoubtedly face an uphill battle in making inroads into the legal system.

While a daunting task, there is precedent to be found in the remarkable development of originalism itself which suggests that common good constitutionalism should not be written off as an interpretive method, just because the former is currently well entrenched in conservative legal circles. As is well documented, originalism went from being considered an intellectually passé, minority position in the 1970s, to the leading constitutional credo of the legal conservative movement and of much of the Federal Courts by the 2000s.¹³⁷

For common good constitutionalism to ever become a serious rival to originalism, a useful road map may well involve making the very same kind of inroads that originalism made from the time it first controversially burst onto the intellectual and political scene, through the advocacy of the likes of Justices Bork and Scalia. Promoting and maintaining a tradition of common-good constitutionalism will thus inevitably be a multi-front engagement aimed at informing judicial ideology and the background socio-political order which influences the assumptions, beliefs, and values of officials about the *purpose* of a constitution and constitutional law.¹³⁸ Altering such beliefs can eventually help take ‘off-the-wall’ heterodox constitutional arguments and positions and make them plausible, or even convert them into a new orthodoxy.¹³⁹

¹³⁷ Greene, “Selling Originalism”; Greene, “Heller High Water: The Future of Originalism”.

¹³⁸ David Kenny, “Merit, Diversity and Interpretive Communities: The (non) party politics of Judicial Appointments” in Hickey, Cahillane and Gallen (eds.), *Judges, Politics and the Irish Constitution* (Manchester University Press, 2017).

¹³⁹ See Jack Balkin, “‘Wrong the Day it Was Decided’: *Lochner* and Constitutional Historicism” (2005) 85 *Boston University Law Review* 677.

Whether it eventually finds favour as an interpretive method or not, debates over common good constitutionalism are likely to rumble on for some time, and the issues it raises will no doubt be of considerable interest to foreign public lawyers and political theorists. This essay has been the first to give these debates sustained treatment. I hope that doing so will allow outside observers to better grasp the political and legal context underlying this nascent debate and the core principles in contest. I also hope it has deflated some of the more alarmist assessments of Vermeule's arguments and therefore facilitates sharper engagement with the actual issues and questions at play.